IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CY TWOMBLY FOUNDATION, and NICOLA DEL ROSCIO and JULIE SYLVESTER, in their capacities as directors and members of the Cy Twombly Foundation, Plaintiffs, v. THOMAS SALIBA, Defendant.	C.A. No. ______________

VERIFIED COMPLAINT

The Cy Twombly Foundation, and its President Nicola Del Roscio ("Del Roscio") and Vice President Julie Sylvester ("Sylvester") on behalf of the Cy Twombly Foundation (collectively, "Plaintiffs'), by their undersigned counsel, hereby bring this Complaint against Thomas Saliba ("Saliba"). Plaintiffs allege, upon knowledge as to facts known to themselves, and upon information and believe as to all other matters, as follows:

NATURE OF THE ACTION

1. The Cy Twombly Foundation (the "Foundation"), a non-profit Delaware corporation, brings this action against Saliba, its Treasurer and a director, for his unlawful self-dealing and misappropriation of hundreds of thousands of dollars in Foundation funds, his violation of securities laws, and related misconduct.

2. Cy Twombly ("Twombly") is widely recognized as having been one of the most inventive and important artists of the twentieth century. He established the Foundation under Delaware law in March 2005 for charitable, literary and educational purposes. At the same time,

Twombly established a revocable living trust (the "Trust") under New York law, to hold art and other assets for the benefit of Twombly during his lifetime, and upon Twombly's death, to distribute the assets among his beneficiaries, including the Foundation.

3. After Twombly passed away in July 2011, the Trust distributed the bulk of Twombly's artwork to the Foundation, and the Foundation expanded the scope of its work to include the preservation of Twombly's artwork and legacy. To that end, the Foundation has been organizing exhibits at museums and galleries, and working to publish various books and catalogues. The Foundation has also purchased a townhouse in New York City to house an education center that will, from time to time, feature exhibits of Twombly's work.

4. Since July 2011, the Foundation has been run on a day-to-day basis by two members of the current, four-person board of directors (the "board"), Del Roscio (President) and Sylvester (Vice President), both of whom had close and long-standing personal and professional relationships with Twombly. They are recognized authorities on his work. The other two board members are Ralph Lerner ("Lerner"), a lawyer retained to create the Foundation, and Saliba, the Treasurer.

5. In August 2012, as a result of their questioning, Del Roscio and Sylvester discovered that Saliba had been causing the Foundation to pay – without board knowledge or approval – hundreds of thousands of dollars in unauthorized "investment management fees" to his so-called investment management firm, "Saliba Managed Funds," starting just six months after Twombly's death. In response to Del Roscio's and Sylvester's demand, the payments have ceased; but they have not been refunded, and had they continued, Saliba would have continued to take hundreds of thousands of dollars each year from the Foundation for the indefinite future.

6. Following their investigation, Del Roscio and Sylvester confronted Saliba with their findings. In response, Saliba (through his lawyer) ultimately admitted that Saliba Managed Funds is not a third-party investment management firm, but rather a fictitious "d/b/a" that he created for himself. Saliba also admitted that neither he nor his fictitious firm is registered as investment advisers with the State of New Hampshire (where his office is located) or the Securities and Exchange Commission ("SEC"). Such registration is required under the Investment Advisers Act of 1940 for paid investment advisers controlling assets between $25 million and $100 million. Because the Foundation had over $60 million in cash and financial investment instruments throughout the time that Saliba paid himself fees, the payment of these fees would have been inappropriate and illegal even if they had been approved by the board.

7. Despite clear evidence of misconduct, Saliba has refused to accept responsibility for his actions. Making matters worse, Saliba is now acting in concert with Lerner (who was complicit in allowing the unauthorized fees), and is compounding his misconduct by obstructing the protocols for discipline under the Foundation's written Conflict of Interest Policy. All of these actions are harming the Foundation – and the harm exceeds the illegal fees themselves. Saliba, as a board member, has violated his fiduciary duty to the Foundation, by, among other things, engaging in self-dealing in violation of the Internal Revenue Code and the securities laws and in blocking the Foundation's ability to take appropriate disciplinary action, which (a) is placing the Foundation in jeopardy of losing its tax-exempt status, (b) is subjecting all of the board members to risk of monetary sanctions under Section 4958 of the Internal Revenue Code (which governs excess benefit transactions), and (c) might draw action by the Delaware Attorney General (which has jurisdiction over non-profits). Saliba is also harming two of the Foundation's greatest assets: its reputation among the community of museums, galleries,

education centers and non-profit arts foundations at large, which lies at the very core of the Foundation's ability to fulfill its mission, and the legacy of Twombly as an artist.

8. To address Saliba's misconduct, the Foundation brings this action against Saliba for breach of his duty of loyalty as an officer and director, in which it seeks reimbursement of the unauthorized "investment management fees," plus interest, together with the Foundation's legal fees incurred in this lawsuit. Following the judgment against Saliba, the Foundation also intends to file a prompt application under 8 Del. C. § 225(c) to remove Saliba as a director.

JURISDICTION AND VENUE

9. This Court has personal jurisdiction over Saliba because the claims asserted against him are based on his activities as a director of the Foundation, a Delaware corporation.

10. Venue is proper in this Court because the Foundation is a Delaware corporation.

THE PARTIES

11. The Foundation is a non-profit corporation formed under Delaware law, and organized under Section 501(c)(3) of the Internal Revenue Code. The Foundation has made various grants to charitable causes and organizations. The Foundation has no members under its bylaws, and thus the members of the Foundation are deemed to be those entitled to vote for the election of the members of the governing body. 8 Del. C. § 102(a)(4). Under the Foundation's bylaws, the directors are entitled to elect the members of the board of directors and therefore each Foundation director is also a member of the Foundation. Accordingly, Del Roscio and Sylvester are members of the Foundation.

12. Del Roscio is the President and a director of the Foundation. He was Twombly's close friend, confidant, collaborator and assistant for almost 50 years. He has worked on numerous shows of Twombly's work at various museums and galleries throughout the world,

and is widely considered a leading authority on the artist. Del Roscio has published numerous authoritative books on the artist's artwork, including a catalogue raisonné of Twombly's sculptures,[1] two volumes of a catalogue raisonné of Twombly's drawings (Del Roscio will publish seven volumes in total; the third volume is currently being printed), a four-volume series of Twombly's photographs, and a book dedicated to various writings on Twombly's work. Together with Sylvester, Del Roscio also edited the forthcoming book Cy Twombly Gallery, The Menil Collection, Houston, Yale University Press, 2013.

13. Sylvester is a Vice President and director of the Foundation. She has curated many international exhibitions, and was recently the first non-Russian curator at the State Hermitage Museum in Russia, where she served as Associate Curator of Contemporary Art for ten years. She organized "Cy Twombly, Fifty Years of Works on Paper," which was one of the Hermitage's first major exhibitions of contemporary art. The exhibition traveled to the Pinakothek der Moderne in Munich, Centre Pompidou in Paris, the Serpentine Gallery in London, the Whitney Museum in New York, and the Menil Museum in Houston. There are plans for the exhibition to travel Korea, Japan and Australia. The exhibition catalogue was published in Russian, German, French and English editions. She is currently working on a retrospective exhibition of Twombly's paintings, drawings and sculpture for the inaugural international exhibition at the Fundacion Jumex in Mexico City, which will open in summer 2014 and tour through South America. Together with Del Roscio, Sylvester also edited the

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[1] In art world parlance, a "catalogue raisonné" is a scholarly publication that provides a comprehensive and annotated list of all known works of an artist either in a particular medium or all media. It is an important tool for researching the provenance and attribution of artwork.

forthcoming book Cy Twombly Gallery, The Menil Collection, Yale University Press, 2013. She was a close personal friend of the artist for more than 30 years.

14. Ralph Lerner is a director, Secretary and a Vice President of the Foundation. He is a lawyer in New York City. Twombly hired Lerner approximately eight years ago, based upon the recommendation of a gallery owner to Twombly and Del Roscio.

15. Thomas Saliba is a director, Treasurer and a Vice President of the Foundation. Saliba met Twombly through Del Roscio approximately ten years ago.

FACTUAL BACKGROUND

Cy Twombly

16. Cy Twombly first emerged in the mid-1950s as a prominent figure among a group of important artists working in New York. He would ultimately become recognized as one of the most inventive and important artists of the twentieth century, with numerous exhibitions at major museums and galleries around the world. Permanent exhibits of Twombly's work can be found at the Museum of Modern Art in New York, the Art Institute of Chicago, the Philadelphia Museum of Art, the Dallas Museum of Art, the Glenstone Foundation in Maryland, the Brandhorst Museum in Munich, the Pinakothek der Modern in Munich, the Tate Modern in London, the Centre Pompidou of Paris, and the Louvre in Paris. A permanent room for Twombly's work is planned at the Virginia Museum of Fine Arts. A permanent collection of Twombly's work also resides at the Menil Collection in Houston, in the Cy Twombly Gallery, a building that was designed by renowned architect Renzo Piano in close collaboration with the artist. Twombly passed away on July 5, 2011 at the age of 83 in Rome, Italy.

The Foundation and The Trust

17. Twombly was one of six original board members of the Foundation. Upon his passing, the remaining five directors were Del Roscio, Lerner, Saliba, Sylvester and Twombly's son, Alessandro Twombly ("Alessandro"). Lerner, Saliba and Alessandro also serve as trustees of the Trust. The Trust held art and other assets for the benefit of Twombly during his lifetime and, upon his death, the Trust was to distribute his assets among his beneficiaries, including the Foundation.

18. Pursuant to the terms of the Trust, all of Twombly's artwork should have been distributed to the Foundation upon Twombly's death. But, following Twombly's death, Alessandro stated an intention to file a lawsuit against the Trust to claim some of the artwork for himself. Lerner and Saliba determined that Alessandro's claim presented a conflict of interest for him as a director of the Foundation, and, accordingly, recommended to Del Roscio and Sylvester that Alessandro be removed as a director. Trusting the judgment of Lerner, who was the only lawyer on the board, Del Roscio and Sylvester reluctantly agreed; and, on January 23, 2012, all four board members voted unanimously to remove Alessandro as a director. No replacement was ever appointed to the vacant board seat.

The Discovery of Saliba's Unauthorized Payments

19. On August 22, 2012, at a board meeting in New York, Del Roscio and Sylvester asked Saliba for a summary of the Foundation's financial information, including various expenses and money on deposit at two banks. In responding, Saliba vaguely referred to payments for "financial services," which he ultimately admitted were payments to his own firm, Saliba Managed Funds. As the board had never authorized any payments to Saliba for any

"financial services," Sylvester pressed Saliba for a detailed breakdown of the amounts paid. Although Saliba promised to provide the information the next day, he did not do so.

20. More than a month passed without Saliba providing the requested facts concerning his self-dealing. Therefore, on September 24, 2012, Sylvester asked the Foundation's accountant to provide a detailed accounting of the payments. The accountant reported that Saliba Managed Funds had received a total of $220,945, starting in January 2012 (six months after Twombly died). The payments (calculated at a rate of 50 basis points per annum on all of the Foundation's cash and financial investments) were made on a quarterly basis as follows: January 9, 2012 – $51,945; April 11, 2012 – $84,500; and July 9, 2012 – $84,500. A subsequent, January 2013 accounting revealed that the payments continued through October 2012, and actually exceeded $300,000. Incredibly, Saliba had been recommending to the board in August 2012 – again, without disclosing his fees – that the Foundation should "preserve capital" by selling tens of millions of dollars of artwork and using the proceeds to make additional financial investments. Saliba did not disclose that such action was in his own personal interest, as it would have caused the Foundation to pay even more undisclosed fees.

21. In September 2012, Lerner revealed that he had been aware of, reviewed and approved Saliba's payments to Saliba Managed Funds, although he never disclosed any such activities to Del Roscio or Sylvester. Lerner admitted to Sylvester in a September 27, 2012 email: "I personally reviewed the invoices, the calculation of Tom's fees and concluded that it was correctly done and [that] the 50 basis points was reasonable." Lerner did not state at the time why he thought he had the authority to approve the fees while keeping the rest of the board in the dark. Lerner's statement surprised Del Roscio and Sylvester; and Sylvester responded

immediately that the payments were not acceptable and were made "without consulting the President of the Board and myself."

22. One week later Lerner changed his story, stating in an October 3, 2012 email that, after "spen[ding] some time looking through past emails," his memory was refreshed, and that he now recalled notifying the board one year earlier that Saliba was receiving fees. Lerner supported his new version of the payments by referring to his September 24, 2011 email, in which he stated (in the seventh paragraph of a two page, single spaced email concerning other topics): "Tom [Saliba] gets paid for investment advice and managing the financial assets for the Foundation and the Trust, to date [sic] all payments have been made by the Trust." Lerner's reference to the September 24, 2011 email was false and misleading because the email cited payments by the Trust, and <u>not</u> the Foundation. In fact, as Lerner has since conceded, his September 24, 2011 email could not have disclosed payments by the Foundation because those payments did not even commence until January 2012 – more than three months later. Saliba's own email of September 24, 2011 further confirms the point. It specifically states that the fees for his "investment advisory consulting service" were "paid by the Edwin P. Twombly Jr. Trust" and "<u>not</u> the Foundation." (Emphasis added) Although Saliba's email does state an intention to seek payments from both the Trust and the Foundation at some point in the indefinite future, the payments that he made to himself were never raised at any board meeting (or in any other discussions or correspondence), and were never approved by Del Roscio or Sylvester.

23. It is indisputable that (a) the board never passed any resolution approving payments to Saliba, (b) neither Lerner nor Saliba ever disclosed to Del Roscio or Sylvester that any such payments would be calculated at a rate of 50 basis points per annum, or that any such fees would total more than $300,000 per year, and (c) Saliba is not a registered investment

adviser, which would be required under the Investment Adviser's Act for Saliba to charge lawful investment management fees to an entity with $25-100 million of assets under management.

24. To address the foregoing misconduct, Del Roscio took action to protect the Foundation. As President, under the bylaws' authorization to "manage and supervise the affairs of the corporation," Del Roscio retained outside counsel for the Foundation, SNR Denton, to review the facts and to determine the Foundation's rights and remedies. As a result of SNR Denton's review, Del Roscio and Sylvester uncovered additional problems concerning Saliba, which were set forth in a Memorandum by SNR Denton that was dated and delivered to the entire board on December 5, 2012 (the "Memorandum"). These problems are set forth below.

The Existence, Status and Nature of Saliba Managed Funds

25. A review of publicly available documents and information from the State Departments of Maine and New Hampshire disclosed troubling issues concerning the existence, status and nature of the business of "Saliba Managed Funds," none of which had been disclosed by Saliba or Lerner to the board. The nature of the issues and the fact that they were hidden from the board has caused Del Roscio and Sylvester to be extremely concerned.

26. It appears that the name "Saliba Managed Funds" was originally used by Saliba for an entity now called Spar Cove Associates, Inc. ("Spar Cove"), a Maine corporation, to register with the SEC in 2007. Spar Cove is no longer registered with the SEC. Furthermore, Spar Cove (incorporated in 1985), was administratively dissolved by the state of Maine in 2008 for failure to file annual reports. Also, Spar Cove registered to do business in New Hampshire in 2006, but was suspended by that state in August 2010 for failure to file annual reports there as well.

27. In December 2010, a new corporation named Spar Cove Associates, Inc. was incorporated in New Hampshire (hereinafter "Spar Cove Associates"). Spar Cove Associates is not currently in good standing because it has not filed an annual report. In addition, Spar Cove Associates (unlike the Maine corporation of the similar name) has not filed with the state of New Hampshire for the right to use the name Saliba Managed Funds as another name for itself.

28. Confronted with the foregoing information, Saliba's lawyer ultimately conceded that an entity called "Saliba Managed Funds" does not exist. Rather, Saliba has been using the name as a fictitious "d/b/a" for himself. Apparently Saliba believed that his use of the name would create the (mis)impression that the Foundation was paying fees to a legitimate outside investment management firm, as opposed to directly to one of its directors.

Saliba's Regulatory Violation

29. Saliba's charging of so-called "investment management fees" to the Foundation violated the Investment Advisers Act of 1940, because Saliba is not a registered investment advisor. Section 203A(a)(2) of the Act provides that an investment adviser with assets under management between $25 million and $100 million must register with either the state authorities or the SEC. The Foundation's cash and financial investments at issue total more than $60 million, but a diligent search has revealed that Saliba is not registered as an investment adviser anywhere. Saliba's failure to register as an investment adviser is a significant – and for present purposes, highly material – regulatory violation. As part of the registration process, Saliba would have been required to make various written disclosures to the Foundation concerning the fees that he was charging, and the potential conflicts of interests that exist. Saliba appears intentionally to have avoided those disclosures, as they would have revealed to the board that he

was taking hundreds of thousands of dollars from the Foundation without any authorization from the board.

30. The Foundation has been informed that the Secretary for the State of New Hampshire is currently investigating Saliba's failure to register as an investment adviser.

Del Roscio Calls a Board Meeting Under the Conflict of Interest Policy

31. Del Roscio and Sylvester ultimately gave Saliba an opportunity to resign voluntarily to avoid any unnecessary conflict, publicity and embarrassment. Del Roscio and Sylvester also concluded that if Saliba declined to resign, the Foundation should convene a special board meeting under its written Conflict of Interest Policy (drafted by Lerner in 2011, and signed by all board members) in order to make a formal determination as to whether Saliba had violated his duties under the Conflict of Interest Policy, and, if so, what disciplinary and corrective action was appropriate. As is common in standard conflict of interest policies, the Foundation's Conflict of Interest Policy provides that conflict of interest determinations are made by the "governing board," excluding the interested party. Thus, in this case, Saliba would be excluded as an interested party, and the governing board would be comprised of Del Roscio, Sylvester and Lerner.

32. The nature of any disciplinary and corrective action was in the discretion of the three non-interested board members (Del Roscio, Sylvester and Lerner). As they evaluated the matter, Del Roscio and Sylvester took into consideration that keeping Saliba as Treasurer despite well-documented misconduct might have significant legal, reputational and other implications, particularly in the event of any future inquiry by the IRS (which could jeopardize the Foundation's tax exempt status), the Attorney General for the State of Delaware (which has jurisdiction to take various actions with respect to non-profits organized under Delaware law), or

in the event that Saliba's misconduct and the Foundation's response becomes known by the community of museums and arts non-profit foundations at large.

33. After Del Roscio circulated the Memorandum to the entire board of directors, Del Roscio and Sylvester made attempts to negotiate an informal resolution with Saliba. These attempts were unsuccessful. Saliba steadfastly refused to resign from the board and return the unauthorized payments. Failing a resolution, Del Roscio sent an email dated January 7, 2013, which called for a formal board meeting under the Conflict of Interest Policy. For the date of the meeting, Del Roscio proposed January 15 or 16, but agreed to January 31 at the request of Lerner, who claimed to be "very busy with meetings and appointments outside the office." Lerner, however, had no intention of permitting the meeting to happen: on January 28, three days prior to the meeting, Lerner declared, via email to Del Roscio and Sylvester, that he would not attend the meeting, thereby destroying the presence of a necessary quorum. On the same day, Lerner filed an action in this Court (the "Petition") seeking the appointment of a custodian for the Foundation, based upon his allegation that the board members were "deadlocked."

34. Contrary to Lerner's claim, there is no deadlock among the board members with respect to the determination of Saliba's conduct, and the appropriate disciplinary and corrective action that should be taken under the Conflict of Interest Policy. The "governing board" that would determine the issue would include the three non-interested board members, Del Roscio, Sylvester and Lerner, and must exclude Saliba. Lerner undoubtedly concluded that he would be outvoted in dealing with the man he had assisted in misappropriating the Foundation's money by a two to one vote, so he used the "deadlock" as a ruse to prevent a meeting and seek a custodian or fifth board member who, he presumably hopes, will vote with him to cover up Saliba's wrongdoing. More galling is that it was Lerner, himself, who prescribed the appropriate censure

and dismissal of Saliba as a board member when, in January 2012, they were confronted with Alessandro's adverse claim against the Trust on certain artwork. In that situation, as Lerner states in his Petition, the determination of Alessandro's conflict of interest "made his service as a director inappropriate."

35. The Petition is an improper attempt by Lerner to frustrate and obstruct the Foundation's board-approved procedures under the Conflict of Interest Policy, and avoid potential claims predicated on Lerner's complicity in the wrongful conduct. For example, the IRS might impose sanctions against both Saliba and Lerner, for violating the Internal Revenue Code prohibition against excess benefit transactions in non-profit corporations (26 U.S.C. § 4958 provides for sanctions against officers of a non-profit corporations who engage in such unlawful transactions, as well as other officers who know about them).

<u>The Foundation's Assets</u>

36. Lerner's Petition overstates the value of the Foundation's "total assets" as approximately $1.5 billion. Lerner does not provide specifics, but the statement of the total assets appears to rely upon an appraisal of the artwork prepared on behalf of the Trust in August 2012, which stated the aggregate value of the artwork at more than $1 billion. The true market value, however, is less. There exists no rational reason for inflating the values – other than that Lerner and Saliba might have deliberately overvalued the artwork in order to pay themselves inflated trustee commissions from the Trust. Lerner and Saliba have refused to provide a copy of the Trust or disclose their trustee commissions, which makes it impossible to confirm the extent of their wrongdoing, but the facts currently known raise very serious questions about Lerner's and Saliba's conduct.

37. In the last year of his life, Twombly worked diligently with Del Roscio in his home in Rome to place his artwork into four distinct categories: finished works, unfinished works, unsatisfactory works to be destroyed, and fragments of works to be used in the future for collages. Pursuant to the artist's instructions, the works were carefully separated and arranged in these categories. Following Twombly's death, Lerner and Saliba hired an appraiser on behalf of the Trust to value that artwork for federal estate tax purposes. The appraisal directly affected the amount of commissions that were claimed by Lerner and Saliba as Trustees of the Trust, because New York Law provides that trustees are entitled to a commission based upon a percentage of the aggregate valuation of all distributions. *See* N.Y. Surr. Ct. Proc. Act § 2309.

38. The appraiser, who was chosen by Lerner, never physically inspected any of the artwork that was valued. Instead, the appraiser relied upon a written inventory list prepared by an "archivist" whom Lerner and Saliba had hired. To compile that list, the archivist visited Twombly's home to review the works, and met with Del Roscio to discuss them. To Del Roscio's great frustration, however, the archivist repeatedly failed to account for the distinctions between the different categories of works. Del Roscio attempted to correct the errors (and note the discrepancies between the archivist's list and the catalogues raisonnés that Del Roscio had published based upon his expertise), but the archivist refused to make many corrections, stating that she was organizing the list pursuant to the instructions from Lerner and Saliba. When Del Roscio made inquiries to Lerner and Saliba, he was told that the inventory concerned the Trust, and that he was not entitled to know about matters regarding the Trust.

39. The final appraisal was based upon the archivist's inventory list, and it compounded the archivist's errors by placing woefully inflated values on a number of works, including works that would never be sold at any price. For example, the appraiser values

numerous unfinished paintings at up to $5 million a piece, numerous unfinished drawings (and other drawings that the artist deemed unfit for approval and wanted destroyed) at prices up to $300,000, and numerous paper fragments (that the artist intended to use in collages that were never actually made) at prices up to $150,000 a piece. Incredibly, the appraisal even valued a drawing that was <u>known to be a fake</u> for $350,000. The drawing had been given to Twombly for authentication years ago by its owner, but the artist had rejected it as a fake. As the appraisal expressly notes, the drawing was signed and inscribed by Twombly "this is a fake drawing" on the back of the paper – and yet the appraisal states that it is worth $350,000. (Exhibit A) The over-valuation of unfinished and unsatisfactory works, unused paper fragments and the fake drawing (among other mistakes) resulted in the inaccurate aggregate valuation of more than $1 billion.

40. Despite Del Roscio's objections, Lerner submitted this appraisal to the IRS, as a trustee on behalf of the Trust. Del Roscio has objected to the over-valuation of the artwork on numerous occasions. For example, Del Roscio raised the topic at a board meeting on October 9, 2012. The board meeting was recorded by tape recorder. As reflected in the transcript, Lerner dismissed Del Roscio's objections, stating that "the IRS doesn't really care because there's no tax involved, it all goes to the Foundation" and "what I have is basically an inventory list and it doesn't matter to the government." (Exhibit B) The Foundation, however, should care because it is a beneficiary of the Trust.

41. While the amounts of Lerner's and Saliba's commissions as Trustees are unknown to Del Roscio and Sylvester, the over-valuation of the artwork could have increased those commissions by hundreds of thousands or millions of dollars per trustee. That may explain why as of the date of this filing, requests to Lerner and Saliba to disclose their commissions and

provide a copy of the Trust have been rejected (even though the Foundation, as a beneficiary of the Trust, is entitled to this information). Concurrent with the filing of this Complaint, the Foundation is filing a petition in the New York Surrogate's Court pursuant to N.Y. Surr. Ct. Proc. Act § 2309 for an accounting by the trustees of the Trust. The information produced in that accounting undoubtedly will assist in determining whether Lerner or Saliba realized improper trustee commissions as a result of the inflated artwork values. In the interim, Del Roscio has requested that, for its own tax filings, the Foundation engage an independent appraisal firm to value the artwork. Lerner and Saliba have rejected the request, claiming that it would cost too much money to engage a new appraiser.

Lerner and Saliba's Relationship with Alessandro

42. Lerner's Petition seeks the re-appointment of Alessandro as a "neutral and qualified person" to fill a fifth board seat to resolve the matter concerning Saliba. Although Del Roscio and Sylvester respect that Alessandro is Twombly's son and an artist in his own right, the relationship between and among Lerner, Saliba, Alessandro and the Trust is troubling, and precludes the appointment of Alessandro as a fifth board member to resolve any deadlock.

43. As set forth above, Alessandro was previously removed from the board at the urging of Lerner and Saliba, based upon the representations by Lerner and Saliba that Alessandro's claim against the Trust for certain artwork created a conflict of interest that made Alessandro's continued service as a director of the Foundation inappropriate. Subsequent to Alessandro's removal, Lerner and Saliba apparently reached a private settlement with Alessandro concerning his claims against the Trust. Unbeknownst to Del Roscio and Sylvester at the time, the settlement included an agreement by Lerner and Saliba to distribute several

important works of art by Twombly from the Trust to Alessandro. The full details of the settlement are unknown.

44. Lerner and Saliba never disclosed to the Foundation board that they had distributed artwork from the Trust to Alessandro. Del Roscio and Sylvester only learned of the Trust's distribution of the artwork to Alessandro at a later date, from discussions with others. Lerner and Saliba also never disclosed to the board that they had a possible conflict of interest regarding the issue: as directors of the Foundation, they had a duty of loyalty to protect the Foundation's property, which included whatever artwork of Twombly's that Lerner and Saliba gave to Alessandro to settle the claims that he asserted against the Trust.

45. As set forth above, concurrent with the filing of this Complaint, the Foundation is filing a Petition in the New York Surrogate's Court for an accounting by the trustees of the Trust. The accounting will determine the facts concerning the artwork distributed by the Trust to Alessandro, and the propriety of the distributions.

46. Whether or not the settlement among Lerner, Saliba and Alessandro was appropriate, there remains a concern over the relationship among the three individuals. Lerner and Saliba remain co-trustees of the Trust, with the power to control the amounts of the remaining proceeds of the Trust that will be distributed to Alessandro and his children. While Alessandro may be an appropriate board member at a future time as part of a mutually acceptable expanded board, the power that Lerner and Saliba currently maintain over Alessandro makes him unfit as a neutral fifth board member with the power to resolve the current conflicts at issue.

COUNT I

BREACH OF FIDUCIARY DUTY

47. Plaintiffs repeat and reallege each and every one of the foregoing allegations as if set forth fully herein.

48. As an officer and director of the Foundation, Saliba owes a fiduciary duty to the Foundation, which requires him to act at all times with the utmost good faith, care and loyalty for the Foundation.

49. Saliba's conduct, described above in detail, causing the Foundation to pay him unauthorized and illegal fees, was disloyal and below the standards of good faith required of an officer and director of a corporation.

50. Saliba's breach of fiduciary duty was in bad faith, and evinced a high degree of moral turpitude, demonstrating such wanton dishonesty as to imply criminal indifference to civil obligations, with reckless disregard of the Foundation's rights.

51. As a result, the Foundation is entitled to a determination that Saliba breached his fiduciary duty to the Foundation, and is liable for a judgment of compensatory damages in an amount to be determined, which shall include the $309,983.61 in unauthorized payments that Saliba took, pre- and post-judgment interest, and the Foundation's legal fees incurred in this lawsuit.

52. Following the judgment against Saliba for breach of fiduciary duty, the Foundation will also be entitled under 8 Del. C. §225(c) to remove Saliba as a director.

WHEREFORE, the Cy Twombly Foundation and its directors Nicola Del Roscio and Julie Sylvester, pray for judgment against Defendant Thomas Saliba as follows:

(1) A judgment that Saliba breached his fiduciary duty of loyalty, and is liable to the Foundation in the amount of $309,983.61, plus interest; and leave to file a prompt application under 8 Del. C. § 225(c) for the removal of Saliba as a director; and

(2) Awarding the Cy Twombly Foundation, Nicola Del Roscio and Julie Sylvester reasonable attorneys' fees, costs and expenses; and

(3) Awarding such other and further relief as the Court may deem just and proper.

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Dated: March 13, 2013